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No. 89-25

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS W. SPINDLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ALFRED F. ARQUILLA
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Maj., JAGC, USA

RANDY V. CARGILL
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

QUESTION PRESENTED

Whether the admission at trial of the recorded and sworn testimony of an unavailable witness given at a preliminary hearing violated the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-4a) is reported at 28 M.J. 35. The opinion of the Army Court of Military Review (Pet. App. 1c-3c) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 10, 1989. A petition for reconsideration was denied on May 9, 1989. The petition for a writ of certiorari was filed on July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(c) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Shafter, Hawaii. He was convicted of assault with intent to commit sodomy, attempted sodomy, committing indecent acts with a male under the age of 16, and felony murder, in violation of Articles 80, 118, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 918, and 934.[1] He was sentenced to life imprisonment, a dishonorable discharge, forfeiture of part of his pay, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review dismissed the assault charge, affirmed the remaining findings, and affirmed the sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On the evening of February 5, 1982, Derek Kusumoto and his 14-year old twin brother Dominic went to a bowling alley near their home at Schofield Barracks, Hawaii. Tr. 397. Derek left the bowling alley at about 8:30 p.m., telling his brother that they would meet at 9 p.m. at their home. Tr. 403-404. Dominic returned home; Derek did not. Tr. 379, 405. At 11 p.m., the boys' father, Lieutenant Colonel Kusumoto, reported to the military police that Derek was missing. Tr. 380. The following evening, at about 10:30 p.m., Colonel Kusumoto identified the dead body of his son Derek at the Tripler Army Medical Center in Hawaii. Tr. 381. See 89-26 Pet. App. 3a.

At about 5 p.m. on February 6, 1982, petitioner reported that he had found Derek's body. Tr. 577-578; GX

[1] Petitioner was convicted of crimes stemming from the same incident in which petitioner's confederate Clifford Hubbard was involved. Hubbard was separately tried, and his convictions (with one minor modification) were upheld on appeal. *United States* v. *Hubbard*, 18 M.J. 678 (A.C.M.R. 1984), aff'd, 28 M.J. 27 (C.M.A. 1989), petition for cert. pending, No. 89-26.

26. In a sworn statement, petitioner told Army Criminal Investigation Division (CID) agents that he found the body while he was photographing various sites at Schofield Barracks. *Ibid.* Petitioner was photographing an underground bomb shelter when he looked down the stairs of the structure. Tr. 577; GX 26. Using a flashlight, petitioner walked down the stairs and found the body. Petitioner described Derek's partially clothed body to investigators. He said that the boy was wearing white, knee-high socks with red and blue stripes. Tr. 564, 567. Military policemen, responding to petitioner's report, found Derek's body face down and naked from the waist down except for a pair of white socks. Tr. 435; GX 7. The socks were rolled down to Derek's ankles; the socks had red and yellow stripes, but the stripes were not visible. GXs 7, 30. See 89-26 Pet. App. 4a.[2]

Doctor Wong, a forensic pathologist, examined Derek's body. Dr. Wong found "abrasions and contusions present on, practically, every surface of the external surface of the body, including the head, the neck, chest, abdomen, the right and left upper extremities, the posterior surface of the chest and also * * * on the right and left knees." Tr. 501. Those abrasions and contusions, according to Dr.

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[2] When later confronted with the photograph showing that Derek's socks were rolled down, petitioner stated, "I must have been there, I know the socks were up, I must have seen him when he was alive." Tr. 854. Petitioner then admitted that he was at the bunker on the evening of February 5, 1982, but he denied killing Derek. Tr. 855. Petitioner related that he had a dreamlike recollection of that evening and remembered seeing three "figures" near the bunker, hearing sounds like someone being raped, and seeing the "black guy [take] the little figure out into the bunker." Tr. 852. Asked why he did not help the boy, petitioner responded, "I couldn't, I knew he was dead." Tr. 855-856. Petitioner then said, "I want to take that back, I didn't mean to say that." Tr. 856.

Wong, were consistent with the boy having been forcibly moved "either up or down, following the longitudinal axis of the body." Tr. 512-513. Doctor Wong also found a bite mark on Derek's chest. Tr. 533. He determined that the cause of death was "asphyxia due to suffocation" caused by "an object or objects [being] applied to * * * the nose and mouth" for three to five minutes. Tr. 520, 521, 525. See 89-26 Pet. App. 5a.

Private First Class Joseph Courtney, who was with petitioner on the evening of February 5, 1982, implicated petitioner in Derek's death. Based on Courtney's statements and other evidence,[3] petitioner was charged with murdering Derek.

2. a. Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted to determine probable cause to hold a defendant for trial. The accused has the right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, to be informed of the identity of his accuser, to cross-examine all available witnesses, and to present evidence in his defense. He may also present any evidence that would mitigate the severity of the offenses. A defendant has the right to have defense counsel appointed to assist him during the hearing. Art. 38, UCMJ, 10 U.S.C. 838 (1982 & Supp. V 1987); Rule for Courts-Martial 405(f) and (g), *Manual for Courts-Martial, United*

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[3] Investigators collected hair samples from Derek's clothing. A forensic serologist and hair analysis expert testified at trial that three of these hairs matched petitioner's head hair to an 80% certainty. Tr. 617-618, 621-622.

States—1984. Moreover, the convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (1982 & Supp. V 1987).

b. In this case, Private Courtney testified under oath during the Article 32 hearing. Petitioner and his appointed counsel were present during his testimony. Tr. 651. Private Clifford Hubbard, who was also accused of participating in Derek's murder, was present with his appointed counsel. *Ibid.* The verbatim transcript of Courtney's testimony during the hearing totalled 129 pages, Tr. 712-841, of which 43 pages consisted of defense counsels' cross-examination of Courtney. See Tr. 754-769, 825-828 (cross-examination by Hubbard's counsel); Tr. 769-782, 828-836 (cross examination by petitioner's counsel).

Private Courtney testifed twice at the hearing. Initially, Courtney denied being with petitioner and Hubbard on the evening of February 5, 1982. Tr. 715, 722-723. Courtney acknowledged that he had made a sworn statement to the Army CID that he was at the bunker with petitioner and Hubbard when Derek was murdered, Tr. 716-717, but he said that the statement was not true, Tr. 720. The Article 32 investigating officer warned Courtney about the possibility that he could be prosecuted for giving a false official statement and advised Courtney of his rights under Article 31(b), UCMJ, 10 U.S.C. 831(b). Tr. 723. Courtney indicated that he wanted to speak with a lawyer, Tr. 724, and he was given the opportunity to do so. The Article 32 hearing was then adjourned for two days. See 89-26 Pet. App. 5a-6a.

When the hearing resumed Courtney testified that on the evening of February 5, he, petitioner, and Hubbard met Derek outside a club for enlisted soldiers located near

the bowling alley where Derek and his brother had been. Tr. 728, 733. They asked Derek if he "wanted to go get high," and Derek said he did. Tr. 733-734. The group walked to a tree near the bunker and smoked marijuana for about ten minutes. Tr. 736-737. Petitioner and Hubbard then began wrestling with each other and "started pushing the kid around." Tr. 737. At one point, Hubbard sat on Derek's chest while petitioner pulled down Derek's pants. *Ibid.* Hubbard rolled Derek onto his stomach and petitioner held Derek down while Hubbard "started rectal intercourse." Tr. 738. When Derek tried to scream, petitioner put his hand over the boy's mouth. Tr. 739. When Courtney tried to intervene, Hubbard pushed him away and brandished a knife.[4] Tr. 740-741. Ultimately, Derek went into a "seizure," and stopped struggling. Tr. 747-748. Courtney pushed petitioner and Hubbard off Derek and checked Derek's pulse. Tr. 748. Finding none, Courtney said, "he's dead." *Ibid.* Thereafter, petitioner and Hubbard carried Derek's body three-quarters of the way down the bunker stairs and let it roll the rest of the way, while Courtney held a flashlight at the top of the stairs. Tr. 750-751. See Pet. App. 6a-7a.[5]

c. Before trial, Courtney left Hawaii for the mainland. Despite diligent efforts by the Army to locate Courtney, he was not found before the trial. See 89-26 Pet. App. 4d.[6]

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[4] Investigators found a buck knife, GX 25, near the bunker. Tr. 446-447. There were no identifiable fingerprints on the knife.

[5] Asked to explain why he earlier denied being with petitioner and Hubbard, Courtney said that he was afraid of them because "they can still get at me, sir." Tr. 822.

[6] Petitioner states that Courtney resurfaced after trial. Pet. 3. Courtney was found approximately four months after petitioner's trial and was discharged from the Army in November 1982. Petitioner never asked for a new trial in light of Courtney's subsequent availability.

At trial, the government moved, pursuant to Mil. R. Evid. 804(b)(1),[7] to admit Private Courtney's testimony at the Article 32 hearing as the testimony of an unavailable witness. Tr. 650. Petitioner objected, arguing that Courtney was not unavailable and that petitioner's counsel did not have a full opportunity to cross-examine Courtney at the hearing. Tr. 651. Petitioner alluded to laboratory reports and the autopsy report that had been prepared after Courtney testified, implying that he wanted to question Courtney about those reports. Tr. 685. The government established that Courtney was unavailable because he was absent without leave. The trial judge then admitted Courtney's Article 32 testimony, Tr. 686-687, noting that petitioner's counsel and Hubbard's counsel had "vigorously" cross-examined Courtney at the hearing. Tr. 685.

d. During trial, petitioner called Dr. Larry O'Neil, a dentist,[8] who had examined the bite marks on Derek's chest. Tr. 909. Dr. O'Neil testified that he found five to seven points of favorable comparison between petitioner's bite pattern and the chest bite mark. Tr. 928. He concluded, however, that the chest bite mark was not consistent with the bite pattern of petitioner, Hubbard, or Courtney. Tr. 911, 914.

3. The Army Court of Military Review affirmed. Pet. App. 1c-3c. It upheld the trial court's finding that Court-

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[7] Rule 804(b)(1) of the Military Rules of Evidence provides that the verbatim record of an Article 32 proceeding is admissible at trial if the declarant is unavailable. Accord Fed. R. Evid. 804(b)(1).

[8] Petitioner overstates Dr. O'Neil's qualifications by calling him a "forensic odontologist." Pet. 3. In fact, Dr. O'Neil was board certified in "general dentistry." Tr. 908. His training in forensic odontology consisted of a one-week course at the Armed Forces Institute of Pathology. Tr. 909, 924. Dr. O'Neil had never before testified about bite marks. Tr. 925.

ney's former testimony was admissible, citing its opinion in *United States* v. *Hubbard,* 18 M.J. 678 (A.C.M.R. 1984), aff'd, 28 M.J. 27 (C.M.A. 1989), petition for cert. pending, No. 88-26. Pet. App. 2c. In *Hubbard*, the same trial judge considered identical testimony offered under identical circumstances. The court of military review in *Hubbard* agreed with the trial court that Courtney was unavailable and found that Hubbard's cross-examination of Courtney was "thorough, lengthy and vigorous." *Hubbard*, 18 M.J. at 683 (89-26 Pet. App. 8d). The court in *Hubbard* therefore concluded that the admission of Courtney's pretrial testimony did not violate the Confrontation Clause. *Ibid.* (89-26 Pet. App. 8d).

4. The Court of Military Appeals affirmed. Pet. App. 1a-4a. The court found that Courtney was unavailable to testify at trial and concluded that the admission at trial of his testimony at the pretrial hearing did not violate the Confrontation Clause. The court observed that Courtney's testimony was subjected to "extensive cross-examination by counsel for both accused." *Id.* at 2a. Responding to petitioner's argument that his cross-examination of Courtney was hindered by the unavailability of Dr. O'Neil's bite mark evidence, the court noted that "[a]bsent any suppression of evidence by the prosecution, admissibility of the former testimony is unaffected." *Id.* at 3a.[9] In so ruling, the court relied on its opinion in *United States* v. *Hubbard*, 28 M.J. 27 (C.M.A. 1989), in which the court emphasized that the " 'Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to

[9] In *Hubbard*, the court discussed the confrontation issue at greater length and specifically found that the prosecution "did not hold back from the defense" but "promptly" provided the defense all evidence as it became available. 89-26 Pet. App. 10a.

whatever extent, the defense might wish.' " 28 M.J. at 33 n.5 (89-26 Pet. App. 11a n.5), quoting *Delaware* v. *Fensterer,* 474 U.S. 15, 20 (1985).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the admission of Courtney's testimony at the Article 32 hearing violated the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not deny that Courtney was unavailable to testify at trial; he does not dispute that Courtney's testimony at the Article 32 hearing was admissible under the former testimony exception to the hearsay rule; and he does not claim that the presiding officer at the pretrial hearing improperly limited his cross-examination of Courtney in any way. Instead, petitioner claims that Courtney's testimony was inadmissible since petitioner was unable effectively to cross-examine Courtney, because the defense was unaware at that hearing that bite marks had been found on Derek's body. Petitioner relies on this Court's decision in *Pennsylvania* v. *Ritchie,* 480 U.S. 39 (1987), and in particular on Justice Blackmun's concurring opinion in that case.

In *Ritchie*, the defendant was charged with sexually abusing his daughter, and the defense sought access to records compiled by a state child welfare agency regarding their investigation of that incident, as well as a report that the defendant's children has been sexually abused on a prior occasion. When the request was denied, the defendant claimed that his confrontation rights had been violated. A plurality of this Court rejected that contention, holding that a defendant can establish a Confrontation Clause violation "only where there was a specific statutory or court-imposed restriction at trial on the scope of questioning." 480 U.S. at 53-54. See *id.* at 53 n.9

("[T]he Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial."). Thus, the plurality held that the Confrontation Clause was not violated where defense counsel was permitted fully to cross-examine the witness, but was not able to use unavailable records in that cross-examination. *Id.* at 54. The plurality stated that the proper analysis under those circumstances is to determine whether denying the defense access to the records violated the Due Process Clause under *Brady* v. *Maryland,* 373 U.S. 83 (1963). 480 U.S. at 53 n.9, 56-58. The plurality also distinguished *Davis* v. *Alaska,* 415 U.S. 308 (1974), in which the Court held that the Confrontation Clause was violated when the defense was not allowed to impeach the critical prosecution witness with the fact that he was on juvenile probation and therefore might have been "cooperating" with the State. The error in that case, in the view of the plurality, was in the fact that the defense was denied any opportunity to use that evidence at trial, not in the fact that the witness's juvenile record was confidential. 480 U.S. at 54. Justice Blackmun concurred in the judgment. He concluded that, under *Davis*, the denial of access to material information could violate the Confrontation Clause if, for example, it prevented the defense from demonstrating that the witness was biased toward the prosecution or had made prior inconsistent statements. *Id.* at 65 (opinion of Blackmun, J.).

This case is materially different from *Ritchie* (and *Davis*) because the evidence regarding the bite marks on Derek's body was available to the defense at trial, and because the unavailability of the evidence at the preliminary hearing did not significantly undermine the effectiveness of the cross-examination of Courtney. The availability of the bite mark evidence at trial, together with

petitioner's (and Hubbard's) unlimited cross-examination of Courtney at the Article 32 hearing, gave petitioner a full opportunity to challenge the accuracy of Courtney's perception and recollection of the circumstances of Derek's death. Courtney unequivocally testified that only he, petitioner, and Hubbard were together with Derek on the night in question, and that petitioner and Hubbard murdered Derek. Dr. O'Neil testified that, in his opinion, the bite mark was not inflicted by Courtney, Hubbard, or petitioner. Petitioner was therefore able to use Dr. O'Neil's testimony to impeach Courtney's account of the crime by suggesting that a fourth person was present at the scene of the crime and was the true culprit. To be sure, petitioner was not able to question Courtney about the bite mark evidence because the autopsy report had not yet been prepared when Courtney testified at the Article 32 hearing.[10] But that would also have been true with regard to any other type of out-of-court statement from a non-testifying declarant, such as an excited utterance or a co-conspirator's declaration. In each case, the declarant could not be cross-examined about the bite mark. Indeed, in light of the extensive cross-examination of Courtney undertaken by the defense at the Article 32 hearing, the only advantage to the defense from having known about the bite mark at that hearing would have been the possibility that Courtney would have recanted his testimony when confronted with that evidence. That possibility, however, is sufficiently remote that it can be

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[10] In *Arizona* v. *Youngblood*, 109 S. Ct. 333, 337 (1988), the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Petitioner concedes that the unavailability of the bite mark evidence at the Article 32 hearing was not due to bad faith by the government, Pet. 9 n.4, and in any event petitioner used the bite mark evidence at trial.

discounted. Petitioner's inability to question Courtney about the bite mark therefore did not deny petitioner the opportunity fairly to challenge Courtney's testimony. Cf. *Arizona* v. *Youngblood,* 109 S. Ct. 333, 338 (1988) (Stevens, J., concurring) (the jury's rejection of a permissive inference that the test of semen samples that had not been properly preserved by the prosecution would have been exculpatory demonstrated that the unavailable test result was immaterial).

This case therefore is governed by the general rule that the Confrontation Clause guarantees a defendant only the opportunity for an effective cross-examination. *Delaware* v. *Fensterer,* 474 U.S. at 20. That rule applies even though the evidence introduced at trial consisted of the former testimony of Courtney. In *Ohio* v. *Roberts,* 448 U.S. 56, 73 n.12 (1980), this Court expressly rejected the suggestion that a trial court must determine "whether defense counsel's questioning at the preliminary hearing surmounts some inevitably nebulous threshold of 'effectiveness' " before the preliminary hearing testimony of an unavailable witness may be admitted at trial. As the Court stated, *ibid.*:

> We hold that in all but such extraordinary cases [*i.e.*, cases in which defense counsel has been found to have been constitutionally ineffective], no inquiry into "effectiveness" is required. A holding that every case involving prior testimony requires such an inquiry would frustrate the principal objective of generally validating the prior-testimony exception in the first place—increasing certainty and consistency in the application of the Confrontation Clause.

2. Petitioner also contends (Pet. 10-12) that the admission of Courtney's pretrial testimony violated the Due Process Clause because the testimony was unreliable. The

Court of Military Appeals, however, was correct in ruling that it was unnecessary to make an independent inquiry into the reliability of Courtney's Article 32 testimony once that testimony was found admissible under the former testimony exception to the hearsay rule. In *Bourjaily* v. *United States,* 483 U.S. 171, 182-183 (1987), the Court made clear that "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " The exception for former testimony is just such an exception. See *Mattox* v. *United States,* 156 U.S. 237 (1895) (testimony given at a prior trial); *California* v. *Green,* 399 U.S. 149 (1970) (testimony given at a preliminary hearing); *Ohio* v. *Roberts, supra* (same).

Preliminary hearing testimony is admitted without a separate inquiry into its reliability because it is "given under circumstances closely approximating those that surround the typical trial." *California* v. *Green,* 399 U.S. at 165. This case illustrates that principle. The charges against petitioner were the same at the Article 32 hearing as at trial. Courtney was under oath during his testimony at the proceeding. Petitioner was present at the hearing, and he was represented by the same counsel who represented him at trial. And not only did petitioner have the opportunity to cross-examine Courtney at the hearing, but he took full advantage of that opportunity, asking a total of 236 questions that probed Courtney's sincerity and the consistency and accuracy of his perception and recollection. Petitioner also profited from the cross-examination of Courtney conducted by counsel for co-defendant Hubbard, who asked Courtney an additional 192 questions. Given these safeguards against the

possibility that Courtney's Article 32 testimony was unreliable, the courts below did not err in concluding that Courtney's prior testimony could be admitted at trial even though Courtney was unavailable at that time for cross-examination.[11]

The case on which petitioner principally relies, *Lee* v. *Illinois,* 476 U.S. 530 (1986), is inapposite. *Lee* involved the admission of a confession made by an accomplice to the crime who was not subject at any time to cross-examination by the accused. Courtney was not shown to be an accomplice,[12] but even if he had been, his Article 32 testimony was not a "presumptively unreliable" custodial confession that fell outside any exception to the hearsay rule. See *Lee*, 476 U.S. at 541. This case is therefore not governed by the decision in *Lee.*

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[11] In any event, even if the trial court was required to determine whether Courtney's testimony was reliable, petitioner's own statements provided powerful corroboration of that testimony. See page 3 & note 2, *supra.* The manner of death (asphyxiation) and the physical evidence (hairs, knife) also corroborated Courtney's testimony. In the companion case, *Hubbard*, the Court of Military Appeals found that Courtney's testimony "was extensively corroborated by physical evidence and by the testimony of other witnesses." 89-26 Pet. App. 12a.

[12] There was no evidence that Courtney participated in any way in Derek's murder. Indeed, Courtney testified that he tried to help Derek. Tr. 740-742; 89-26 Pet. App. 6a-7a. The trial judge gave an accomplice instruction nonetheless, Tr. 1038, reasoning that the jury might believe Courtney was "criminally involved in the venture." Tr. 989. The Court of Military Appeals expressed doubt whether Courtney was an accomplice, but found (in the *Hubbard* case) that his testimony was sufficiently corroborated even if Courtney was an accomplice. 89-26 Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED F. ARQUILLA
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Maj., JAGC, USA

RANDY V. CARGILL
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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